

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

560 SEVENTH AVENUE OWNER PRIMARY LLC,
Debtor.

Case #23-11289-pb
New York, New York
August 15, 2023
2 o'clock calendar

- DOC 2 MOTION TO APPROVE USE OF CASH COLLATERAL
- DOC 3 MOTION TO AUTHORIZE PAYMENT OF PRE-PETITION PAYROLL
- DOC 5 MOTION FOR JOINT ADMINISTRATION
- DOC 6 AMENDED MOTION FOR JOINT ADMINISTRATION
- DOC 7 AMENDED MOTION TO APPROVE USE OF CASH COLLATERAL
- NOTICE OF HEARING ON FIRST DAY MOTIONS (RELATED DOCS 7, 3, 6, 4)

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1 THE COURT: Good afternoon, everybody. Good to see
2 you again. It hasn't been very long. So, we're here on the
3 first day hearing for what I'm going to call the hotel. We now
4 have a mezzanine debtor, which I might refer to as Holdco, and
5 now we have the operating company as well. We have three
6 motions on the calendar today, but before we get into that, I'll
7 take any opening statements that people may wish to make.

8 MR. NASH: Good afternoon, Your Honor. Kevin Nash for
9 the debtor. I'm appearing under a colleague's screen, Jessica
10 Sprague, because my speakers didn't work in my office. I'm
11 happy they work here. Yes, Your Honor. I appreciate the
12 opportunity. As we advised the court during the prior hearings,
13 the bankruptcy of the hotel was forthcoming. Before we filed
14 the hotel, I think we did a good deal of preparatory work in
15 terms of negotiating with the senior lender on cash collateral,
16 visibility issues, budgets and the like. We reached agreement
17 on a memorandum of understanding with the union, and we were
18 very much in contact with the franchisor, Margaritaville, who
19 was very interested in what the petition had to say and how the
20 hotel was portrayed. And we had a good deal of discussion with
21 them over the weekend. And I think we came to a consensus of
22 what would be said and how it would be said in the declaration.

23 As I indicated before the court in the mezzanine
24 lender situation, I think this is a very good asset. I think it
25 operates well, it generates income, and the budgets that we put

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1 together, I think are reflective of that. I don't want to get
2 ahead of myself, but I think going forward the hotel will be
3 able to operate within the corners of the budget and will be
4 able to generate positive cashflow for the lender. But I
5 realize you have to walk before you run, and this is an interim
6 hearing on cash collateral.

7 THE COURT: I didn't want to cut you off, but if those
8 were the basic points you wanted to make, I do have a question
9 for you.

10 MR. NASH: Yes? Yes, Your Honor?

11 THE COURT: So, I saw the budget and it shows a
12 significant amount of net cashflow after payment of debt
13 service. But I saw somewhere in the papers, I'm blanking right
14 now on where I saw this, that the debtors are planning to get a
15 DIP loan, and I was wondering whether that's really needed in
16 the circumstances.

17 MR. NASH: I think it is in the sense that I think the
18 lender is looking to be taken out of this situation. And I do
19 think we need added liquidity. And so, we have been moving in
20 the direction of seeking a DIP loan. And you will hear from
21 lender's counsel. I think they would like to be refinanced out
22 as soon as we can do it. But Your Honor is right, we can
23 service the debt not necessarily at the full contract rate, but
24 there is positive cashflow here. And I do think added liquidity
25 would be very helpful as well.

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1 THE COURT: Okay. I'm raising the issue now just
2 because I know DIPs sometimes can be quite expensive, and they
3 also can be accompanied by provisions that hamper a debtor's
4 flexibility. So, I'm quite cognizant of those issues, and I'm
5 sure you are, too.

6 MR. NASH: Yes, there is an expense to it, judge,
7 you're 100 percent right. And it's a higher cost of money.
8 Although, this refinancing, given the changes in the market
9 rates, is a decent interest rate as well. But we are aware of
10 all those costs as well.

11 THE COURT: And I guess the one other point I'd make,
12 just to get your reaction, and then, I'd be curious to hear Mr.
13 Petrick's reaction to these various points, as I think everybody
14 on this virtual hearing is well aware, there's a pending lift
15 stay motion at the mezzanine level. And if that were granted,
16 it would result in either the lender stepping into the shoes of
17 management, I assume at the hotel level, or either the lender or
18 a purchaser doing that. And it just seems to me, I don't want
19 to prejudge what the outcome of that motion will be, but it's
20 very possible that will be the outcome, and it may happen
21 relatively soon. And if that were to happen, and if I were to
22 have approved a DIP shortly before that, does that have the
23 potential to result in wasted money, and also constraints on the
24 debtors freedom to operate that parties might regret?

25 MR. NASH: Let me just be very clear. We wouldn't

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1 bring on an application to approve a DIP facility until we got
2 by August 31. So, I would never do that; I would never be so
3 presumptuous. We are working towards that. I am hopeful we'll
4 be able to survive the first phase of the lift stay motion, but
5 I would never bring on a motion until I survived August 31,
6 although we are working to tighten up that term sheet.

7 THE COURT: Okay. All right. I appreciate that. And
8 that makes sense. I guess one other question I'd ask you is, it
9 looks to me that based on your numbers at least, and the lender
10 may have different views, but based on your numbers, you believe
11 that your lender is over secured by a pretty large sum. Is that
12 right?

13 MR. NASH: I believe that on a valuation of this
14 hotel, the first lender is in a good position. The first lender
15 is over secured. That's what I believe. Every appraisal I've
16 seen is more than \$154,000,000. And I'm not going to say
17 definitively that the market forces can't change that, but
18 everything I've seen shows this hotel is worth well more than
19 \$154,000,000.

20 THE COURT: Right? I mean, in fact, the papers that
21 were filed in connection with the mezzanine lift stay motion
22 show that it's worth a good deal more than that.

23 MR. NASH: Yes, obviously we're talking to a DIP
24 lender, not that that's the barometer, but we're talking to them
25 at \$170,000,000. So, I think on an underwriting basis, I don't

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1 think there's any doubt, at least in my mind, that this hotel is
2 well worth \$154,000,000.

3 THE COURT: Right. Okay.

4 MR. NASH: I quite frankly, think it would be the
5 steal of the century at \$154,000,000.

6 THE COURT: Okay. All right. Thank you, Mr. Nash.

7 MR. NASH: And I know it's relatively early in the
8 century, but it would be a steal of a century.

9 THE COURT: Okay. Thank you, Mr. Nash. Mr. Petrick,
10 would you like to add anything?

11 MR. PETRICK: Yes, thank you, Your Honor, and good
12 afternoon. And thank you for accommodating us all today. I
13 appreciate it. I am here on behalf of OWS CRE Funding I, LLC,
14 the senior secured lender. I do have a few comments and
15 thoughts I'd like to share with Your Honor today. First and
16 foremost, our primary interest up till today has been to
17 preserve our collateral and to make sure that the hotel has
18 enough funding to operate and operate well. It's in nobody's
19 interest to see that hotel's operation upended. And to that
20 end, as Mr. Nash indicated, we have worked the last few weeks to
21 negotiate the consensual use of cash collateral. And I am
22 pleased to echo Mr. Nash that we have an agreement on consent to
23 use our cash collateral, which we think is in the best interest
24 of all parties in the case.

25 Second, as I foreshadowed to you at the lift stay

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1 motion, we have, and we've expressed this in Mr. Nash number of
2 times, great concerns about the necessity of this filing. Part
3 of that goes to Your Honor's question that if a lift-stay motion
4 is granted in the next few weeks, the necessity or the
5 appropriateness of this proceeding comes into even sharper
6 focus. And beyond other reasons, it seemed to us that the
7 filing should have been postponed until that Lift-stay motion
8 was decided. We do not think that this case serves our
9 interest, the mezz's interest, the congregation's interest or
10 the union's interest. It may serve the out of money equity
11 sponsor's interest, but we are very concerned about that and we
12 reserve all rights to take appropriate action with respect to
13 the petition.

14 There is a piece of paper that describes a DIP
15 facility that would effectively take us out at whole. We have
16 heard about this financing for some time now, came a little bit
17 more in focus with this piece of paper a few weeks ago. As we
18 understand it, the lender's due diligence is to be completed
19 during the month of August. And it would be helpful to us to
20 understand, Mr. Nash, where they are in that due diligence
21 process. We understand it's mostly confirmatory financial due
22 diligence, but if that loan proceeds and the timeline would be
23 to take us out to file a motion for approval of the DIP in
24 September and to take us out upon approval of that DIP. So,
25 we're cautious and anxious to see how that financing takes place

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1 and if it is actionable and executable. So, we're waiting for
2 that to see how that develops. In the meantime, reserving our
3 rights to take appropriate action with respect to the filing if
4 that financing were not to materialize. So, for today that's
5 some background and maybe foreshadowing for what is coming up
6 down the pike. But for today the main interest is protecting
7 the collateral, and we've been able to reach the cash collateral
8 resolution which we think is appropriate and good for the debtor
9 today.

10 THE COURT: Okay. Thank you, Mr. Petrick. And just
11 to explore a little bit further, I realize you've not made a
12 motion to dismiss, and I'm not suggesting that you do, but I
13 would like to understand the facts a little bit better. It
14 sounds like your view is, the debtor could have continued
15 operating with no adverse consequences outside of bankruptcy.

16 MR. PETRICK: Yeah, the mezzanine filing obviously was
17 triggered by the UCC foreclosure action, but there was no
18 imminent threat at the hotel level. The union matter has been
19 resolved but there was nobody threatening as far as we know, to
20 take action adverse to the hotel. And indeed, since at least
21 April, the hotel has been functioning well with most of the
22 money that's generated by the hotel from rents and food and
23 beverage being sent to a lockbox in our control and then
24 disbursements of those funds to pay the ordinary and necessary
25 expenses of the hotel. So, it seems to us that everything that

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1 needs to be resolved, there is a deal with the union that was
2 obviously reached outside of bankruptcy. There is the
3 congregation issue that needs to be resolved, and other than
4 some fairly minor mechanics liens, there does not seem to be a
5 lot of other creditors who haven't been paid which would
6 necessitate, which would either cause a threat to the hotel or
7 necessitate the filing. So, we do believe that this is a very
8 expensive way for the equity holder to retain control.
9 Obviously, I think the flag, Margaritaville, would have
10 preferred not to see this in bankruptcy as well.

11 So, lots of reasons not to file, not a lot of obvious
12 reasons why it had to file or had to file at this juncture. But
13 as we say, that is an issue reserving our rights that we will
14 bring forward to report depending on how things progress with
15 the DIP lender.

16 THE COURT: Let me just follow up on that in one
17 respect. It sounds to me like from your perspective there's no
18 threat, as you said, at the hotel level. Looking at it from the
19 outside, one might say the only threat that's apparent or
20 potential threat is the fact that the debtor is in default with
21 its secured lender. But I gather you're essentially telling me
22 that from your perspective at least, that's not a problem
23 because you want to see the hotel succeed, and you're prepared
24 to work with it to that end.

25 MR. PETRICK: Correct. Either through a sales process

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1 outside of bankruptcy or a refinancing outside of bankruptcy.

2 There were other ways, in our view, less expensive of achieving
3 what the debtor was trying to achieve in this case.

4 THE COURT: Okay.

5 MR. NASH: If I could just respond, because I think
6 we're missing three big pieces of this.

7 THE COURT: Yes. Go ahead, Mr. Nash.

8 MR. NASH: Yes, a big piece of this is, there's an
9 outstanding judgment that was recently entered for \$3.1 million
10 by the management company, which is a live judgment, but for the
11 chapter 11 filing. There are defaults under the food and
12 beverage lease and there are defaults under the franchise
13 agreement, there is outstanding payables owed to a number of
14 suppliers. I think the patience of those people would wane
15 unless they saw, and we've had discussions, quite frankly, with
16 Margaritaville on this. They are happy to see the ability to
17 pursue a DIP loan. We are limping along. We could use
18 liquidity infusion, and the DIP loan would give us that. So,
19 we're holding the fort, so to speak. But if you look at where
20 we are, there's defaults under the lease, under the franchise.
21 It's a judgment of \$3.1 million. Yes, there's mechanics liens
22 as well. There's unpaid suppliers. And so, I do think the
23 hotel, and I said this at the last hearing, needs a full global
24 restructuring. There is obviously a senior lender and two
25 mezzanine lenders. I think the senior lender is, quite frankly,

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1 in the best position. But there's a lot of pressure on this
2 hotel. And the decision to file a chapter 11 was not made
3 lightly, but quite frankly, it's been in the works for some time
4 now. And notwithstanding that, we have made progress with the
5 union, and I think at the end of the day, we'll be able to
6 present evidence that Margaritaville will support us and that
7 the food and beverage people will support us and so forth. But
8 I don't want to give any false illusions. There are multiple
9 issues plaguing this hotel that require a chapter 11.

10 THE COURT: So, Mr. Nash, I appreciate that input.
11 I'm struggling with one aspect of it. Maybe you can help me
12 understand this a little better. Looking at the budget attached
13 to the cash collateral motion, it shows fluctuating numbers from
14 month to month. But generally speaking, something like \$300,000
15 of net cashflow available each month on average.

16 MR. NASH: Right.

17 THE COURT: And I'm trying to square that with what
18 you've said about amounts of the suppliers and defaults under
19 various agreements.

20 MR. NASH: No, I think it's about \$300,000 a week. We
21 are projecting anywhere --

22 THE COURT: Is it a week, not a month?

23 MR. NASH: Yes. We're projecting anywhere between
24 \$700 to \$900,000 per month of excess cashflow immediately. And
25 we think that cashflow will get better as we go forward. Having

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1 said that, which sounds good, that there's 900,000 of excess
2 cashflow, the baseline on the first mortgage is a 1.7 million.
3 So, there are issues that we have to restructure. And to Mr.
4 Petrick's point, what the DIP lender is looking at is a lot of
5 the stuff that we're looking at now. They're looking at income,
6 projections on income, expenses. They're drilling down on
7 excess cashflow because every lender has to have a firm handle
8 on that. I'm not apologizing to anybody if it's a million
9 dollars, we like it a little bit more than a million dollars per
10 month, but that gives a sizable payment towards the first
11 lender.

12 THE COURT: Okay. All right, thank you, Mr. Nash. I
13 believe Mr. Masumoto is here. Did you want to be heard, Mr.
14 Masumoto?

15 MR. MASUMOTO: Good afternoon, Your Honor. Brian
16 Masumoto for the Office of United States Trustee. Your Honor,
17 we had discussions with the debtor regarding the various
18 motions, and I believe we have no issues regarding the joint
19 administration or the wage order. We did request just prior to
20 the hearing that the combined cash collateral and the cash
21 management order, which is sort of collapsed together, typically
22 done separately. We asked that a provision that we normally add
23 to the cash management order, indicating that they will have 45
24 days to come into compliance with Section 345 to allow our
25 office to discuss with the debtor the establishment of DIP

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1 accounts and the lockbox arrangement. I also had some
2 discussion with Mr. Nash, regarding the monthly operating
3 report, and how the lockbox would be reported pursuant to that
4 to ensure that all amounts of income generated by the debtor is
5 reflected in the operating reports. But other than that, I
6 believe we've resolved all of our issues.

7 THE COURT: I'm trying to understand the upshot of the
8 points you just mentioned. Is the upshot that these are issues
9 that may that are not yet in the proposed orders that I've seen,
10 but that may get added to them?

11 MR. MASUMOTO: Yes. I believe the only additional
12 provision is with respect to the cash collateral/cash management
13 order. Since it does have a cash management component, which is
14 usually a separate motion, we ask that a provision that we
15 typically add, which is that any bank accounts would be subject
16 to a 45-day extended period, allowing us to make sure that those
17 accounts comply with the Section 345 requirements that they be
18 collateralized. At this point, I believe the debtor has
19 indicated they haven't really established a DIP account. I
20 believe that's anticipated that they have existing accounts.
21 They have a lockbox arrangement, a suspense account which will
22 be eliminated and a DIP account will be created. Until the DIP
23 account has been identified and sort of evaluated to ensure that
24 it complies with Section 345, we ask that there be an extension
25 of period of time to allow the debtor to come into compliance

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1 with 345. If at some point the debtor decides that they will
2 seek a waiver of Section 345, that extended period will also
3 allow them to make that determination.

4 THE COURT: Let's put off going into that issue
5 further until we get to the cash collateral motion and then
6 we'll hear what Mr. Nash has to say about that. And then
7 obviously you can address it further if you like.

8 MR. MASUMOTO: All right, thank you.

9 THE COURT: Okay. Thank you. All right. So, let's
10 move on to the motions. And Mr. Nash, I believe that the first
11 day declaration that you've filed includes evidence that's
12 relevant to two of the motions. So, maybe the way to proceed
13 is, why don't you put on any evidence that may bear on any of
14 the three motions first, and then we'll turn to the three
15 motions one by one.

16 MR. NASH: Yes, Your Honor, Kevin Nash for the debtor.
17 On Zoom with me, I think, is Mr. Pomerantz. I saw him briefly.
18 There he is. Mr. Pomerantz is the chief officer of the debtor.
19 He's a financial officer as well. He submitted a first day
20 declaration, which I would like to move into evidence. And if
21 Your Honor will allow me, I'd like to make a proffer on behalf
22 of Mr. Pomerance, and I would ask the court to allow me to move
23 that declaration into evidence, and I will make a proffer. I
24 can tell the court Mr. Pomerantz has worked hand in hand with
25 the lender, and the lender's representative on the budgets. He

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1 is --

2 THE COURT: Sorry to interrupt. I don't want you to
3 repeat what's in his declaration. If you want to offer it into
4 evidence, then, please, let's do that.

5 MR. NASH: Okay.

6 THE COURT: If there's anything else you want him to
7 testify to, then you can tell me that as well.

8 MR. NASH: Yes. So, I would move, Your Honor, to move
9 Mr. Pomeranz's declaration into evidence.

10 THE COURT: So, let me ask if anybody objects and also
11 if anybody wishes to question Mr. Pomeranz. Okay. I hear no
12 responses, so there are no objections. And with that, I will
13 accept Mr. Pomeranz's declaration into evidence for purposes of
14 today's hearing.

15 MR. NASH: Thank you, Your Honor.

16 THE COURT: And I'm assuming there's no other evidence
17 you want to put into the record before we proceed?

18 MR. NASH: No, I'm relying on the Pomerantz's
19 declaration, and the terms of the motion and the proposed order
20 in the budget.

21 THE COURT: All right, so let's proceed. Let's go by
22 order. Let's start with the simplest first. So, the joint
23 administration motion is very plain vanilla and simple. Mr.
24 Nash, was there anything you wanted to say in that regard?

25 MR. NASH: No, no, I try to make it as conventional

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1 and simple as possible. And I've circulated to the U.S.
2 Trustee. I think I filed it online. I don't think there's any
3 objections to it. Mr. Masumoto had certain language they want
4 to put in the order, and I think we've incorporated that.

5 THE COURT: All right. You're correct. No objections
6 to that motion have been filed. Let me ask, though, if anybody
7 wishes to be heard with respect to the joint administration
8 motion. I'm hearing no response. The order looks fine to me.
9 So, we will proceed to enter it.

10 MR. NASH: Thank you, Honor.

11 THE COURT: All right, next up, the payroll motion.

12 MR. NASH: Yes, the payroll motion, I think, is a very
13 important motion, Your Honor. In a large respect, we were very
14 sensitive to the employees. We obviously want to keep harmony
15 at the hotel. I try to lay out in the Pomerantz declaration,
16 you know, how the payroll works in terms of the work week when
17 it goes to ADP. You know, I'm going to say, generically,
18 payroll checks are issued, they're really direct deposits. But
19 it's, I think, a Monday-Sunday work week. Monies go to ADP on
20 Tuesday, and payroll is made on Friday. So, given the fact that
21 we filed on a Saturday, there is an overlap and we did bring on
22 the motion. Approximately, \$100,000 of payroll is covered by
23 the motion.

24 And we do make one clarification, there's certain
25 administrative-type people that are paid under the general

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1 administrative budget. And one of the people is paid by Dream.
2 And Dream is the third party management company, Dream
3 affiliate. And so, we did include that person in the proposed
4 order. Her name is Grace Anne Moore. She makes approximately
5 \$1,900 a week. She is a director of finance type of person.
6 And historically, she, I guess, serves multiple roles in the
7 Dream organization and she's employed by an affiliate and the
8 allocated portion of her compensation is about \$1,900 to the
9 debtor. And so we want to include her in the payroll, not for
10 her prepetition claims or Dream's prepetition claims, but on
11 this, what I call transition payroll between prepetition and
12 post petition. But the general payroll is fairly consistent.
13 It's covered in the budget under various line items, mainly
14 hotel expenses. That item includes a good part of the payroll.
15 Some of the payroll is covered under repair and maintenance for
16 those people that do servicing and repair obligations in a
17 hotel. And the other parts of the payroll are included in
18 general and administrative.

19 So, it's a three headed set of categories that covers
20 the entirety of the payroll. But obviously, I believe that the
21 payroll is absolutely essential to maintaining the good
22 relations at the hotel. So, I would ask the court to approve
23 this motion. Nobody's getting anything more than a priority and
24 mostly it's a small transition claim that we're paying.

25 THE COURT: Would anybody else like to be heard with

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1 respect to this motion?

2 MR. MASUMOTO: Yes, Your Honor. Brian Masumoto for
3 the Office of the United States Trustee. Prior to the hearing,
4 Your Honor, I did have some discussions with Mr. Nash to
5 clarify, particularly when the issue came up with the payment to
6 Ms. Grace Ann Moore, whether or not that payment or how it was
7 reflected on the budget that was attached to the cash collateral
8 order. I inquired as to whether or not the amounts payable to
9 Ms. Moore was included in the management fee to the hotel
10 manager and was advised technically not. And it was somewhat
11 complicated. It's actually supposedly included in the
12 administrative and general category line item on the budget.
13 But the debtor, Mr. Nash, confirmed that any payments to Grace
14 Ann Moore was listed on the budget, included on the budget. My
15 main concern was to make sure that income generated by the
16 debtors would be accounted for either on the budget and to
17 ensure that there weren't any other non debtor entities that
18 were receding such funds. Again, I did receive assurance that
19 any payments that are generated by the debtors are accounted for
20 by the budget, and accordingly, I have no objection.

21 THE COURT: Okay. Thank you. Would anybody else like
22 to be heard? Okay. I hear no responses. I have a couple of
23 questions of my own, Mr. Nash.

24 MR. NASH: Sure.

25 THE COURT: The first is about paragraph three of the

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1 proposed order. It refers to paying all withholdings and
2 administrative fees. What are the administrative fees?

3 MR. NASH: I think it's generic. I'm trying to
4 capture anything that an employer has to pay in payroll. So,
5 maybe we can use the words "pay all withholding related fees and
6 expenses" or "withholding taxes and so forth." I'm just trying
7 to capture everything on the employer side for a payroll.

8 THE COURT: So, why don't you clarify that?

9 MR. NASH: Yes.

10 THE COURT: I think clarification along those lines is
11 probably useful.

12 MR. NASH: There's no override on the payroll. I
13 don't know if there's an ADP fee in there, but I will get a
14 clarification.

15 THE COURT: Okay. The only other comment I had
16 relates to the issue whether this is an interim or a final
17 order. And I think that issue may be a little bit academic here
18 because I think all of the relief you're seeking, assuming I
19 grant the order, is going to happen right away and not await a
20 later order. On the other hand, I think I'd feel a little more
21 comfortable if we styled this as an interim order. And then you
22 could add a provision at the end, a standard provision that says
23 something along the following lines:

24 In the event no objections to entry of the proposed
25 final order are timely received, the court may enter the

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1 proposed final order without need for a final hearing.

2 MR. NASH: I will do that, Your Honor. I've seen
3 those provisions. We are going to pay it immediately, assuming
4 Your Honor enters the interim order. But I will certainly put
5 that in.

6 THE COURT: I guess from my standpoint, the one thing
7 that gives me a little bit of comfort is this way if there is a
8 committee appointed, and I suspect that may be unlikely, but one
9 never knows for sure, they'd have a chance to weigh in and if
10 they had any issues, they could raise them. I realize the money
11 will have gone out the door.

12 MR. NASH: Yes, that's fine, Judge.

13 THE COURT: Okay. So, why don't you submit a new
14 order with clarifying language, maybe run it by Mr. Petrick and
15 Mr. Masumoto first, and at the same time, perhaps, submit a
16 proposed final order and we'll hold that, and then, potentially
17 enter that when the time comes.

18 MR. NASH: I will do that.

19 THE COURT: All right. Mr. Masumoto, I forgot to ask
20 you before we got to the motions, so let me ask you now, can you
21 fill me in on whether there's any possibility of a committee
22 being appointed here, and if so, what the timing would look
23 like?

24 MR. MASUMOTO: Your Honor, we sent out solicitation
25 letters with our typical form today, and we received email

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1 addresses to the creditors that were listed on the top 20
2 largest creditors. We did put August 24th as sort of the
3 deadline to receive any responses. So, we should by that date
4 have received responses of creditors who are interested in
5 serving on the committee and generally within a day or two of
6 receiving those responses, if there is sufficient interest, we
7 typically will appoint a committee.

8 THE COURT: Okay. Let me just look at my calendar.
9 Give me one second. So, if there is a committee, it sounds like
10 you're saying, in all likelihood, it would be appointed within
11 the next two weeks, if not a little bit sooner.

12 MR. MASUMOTO: That's correct, Your Honor.

13 THE COURT: Okay. That's helpful. I realize the
14 chances of that happening may be low. Okay. So, I think we're
15 done with the payroll motion. Let's move on to the main event,
16 the cash collateral motion.

17 MR. NASH: Yes, Your Honor. It is the main event.
18 And I recognize from the U.S. Trustee's perspective, it is a
19 combined use of cash collateral and cash management. And the
20 genesis for that is, since day one, there's always been a
21 lockbox in place. And I just want to spend a little time
22 explaining, as I understand it, the mechanic and where we see
23 that mechanic being utilized in the bankruptcy case. Prior to
24 bankruptcy, I guess all of the hotel accounts, collections,
25 credit cards and receipts were linked in the first instance to a

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1 lockbox, which as I understand was maintained at Wells Fargo.
2 Then I understand, prepetition, once the monies went into
3 lockbox, if not simultaneously, contemporaneously, they went
4 from a lockbox into a suspense account for the debtor's
5 collections. And then from there, they went out of the suspense
6 account into a hotel operating account for the payment of
7 expenses. And so, it was a lockbox, suspense, operating account
8 system. And what we wanted to do as part of the cash collateral
9 is to keep that in place, not rock the boat on any of this
10 stuff. But we did want to simplify it, and I think it's
11 important how I think we're going to simplify it.

12 THE COURT: I appreciate this explanation, but let me
13 just ask one question. I'm new to cash management systems, how
14 they work. It's not something I've dealt with much in the past.
15 What's the purpose, just as a general matter, for having two
16 separate accounts, a lockbox and separately a suspense account?

17 MR. NASH: I think that's more on the bank's side.
18 They have, I guess, a collecting account, but I don't know if
19 it's a master collecting account or just for the debtor. But
20 the disbursement comes out of a suspense account. They don't
21 keep it there for an indefinite period at all. I think they
22 keep it there very transitory. And the main action goes from a
23 suspense account to an operating account. I just think with
24 their administrative banking system, that's how it was done
25 prepetition or that's how it was explained to me. Once it was

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1 explained to me that way, I said, why don't we -- and I think
2 the bank's in agreement, because these accounts are maintained
3 or administered by Wells Fargo. So, my thought was keep the
4 lockbox in place and set up a DIP account with Wells Fargo and
5 the monies that come into the lockbox, as the debtor needs them,
6 would go into the DIP account at Wells Fargo. And I think
7 that's the way we have it set up under the proposed interim cash
8 collateral. So, it's really a receipt, requisitions are made,
9 proper paperwork is given to the lender, they remit into the DIP
10 account, and the rest of the money, I guess, will be held by the
11 bank in reserve for their debt service payments. And so, we
12 would fund operations through a conventional DIP account. And
13 it being at Wells Fargo, it's a matter, I think, of more
14 internal transfers than anything else.

15 THE COURT: And I gather this arrangement you've
16 worked out with the consent of your lender and also Mr. Masumoto
17 in his office.

18 MR. NASH: Yes, we spent a fair bit of time on it. I
19 wrote it up one way, the bank expanded upon the way I conceived
20 it and spoke about it. And a lot of the terminology in that
21 cash collateral order and the terminology in the motion is a
22 unified way between the debtor and the bank of presenting how
23 this is going to be done. And it ensures complete visibility,
24 proper accounting, and we don't have to reinvent how these
25 collections are made. It's all electronic payments at this

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1 point, or substantially all electronic payments. It's just an
2 easier way of keeping status quo, keeping that lockbox in place.

3 THE COURT: And just to eliminate any suspense here, I
4 had no issues with the arrangements described in your papers.
5 And particularly given that both your lender and the U.S.
6 Trustees office are fine with it, then I'm not going to raise
7 issues about that.

8 MR. NASH: I appreciate that, judge. Just so the
9 court knows, we did think about it. We tried to do it in a way
10 that promoted an easy transition and gave accountings and dealt
11 with the U.S. Trustee guidelines and their requirements as well.
12 So, we try to be fair that are processed from all angles.

13 MR. MASUMOTO: Your Honor, if I may? Brian Matsumoto
14 for the Office of the United States Trustee. As I believe I
15 stated earlier, I did have discussions with Mr. Nash regarding
16 the lockbox arrangement and did receive a commitment that the
17 Lockbox arrangement would be reflected on the monthly operating
18 reports, so that all income of the debtor is captured and
19 accounted for through those reports that will be available to
20 our office and to the public.

21 THE COURT: Mr. Nash?

22 MR. NASH: Yes. I was very attuned to the need to do
23 that. Obviously, the biggest payment of the month is going to
24 be a lockbox payment to the lender, and that has to be captured
25 in the operating report for both reporting and quarterly fee

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1 purposes. Plus, the U.S. Trustee wants to know at all times,
2 where the money is, where it sits, and how it's spent, so we are
3 going to do that report.

4 THE COURT: Okay. I don't want to disrupt the flow of
5 your presentation, but either now or at some point, do you want
6 to address the point Mr. Masumoto made earlier about the
7 creation of the DIP account, which is, I guess, in process right
8 now?

9 MR. NASH: Right. The thought is to use Wells Fargo,
10 which administers the lockbox, as the DIP lender, and we will
11 prepare and file all the necessary paperwork. We just think
12 that's the easiest way to go. They're already involved in the
13 administration of the funds, and so we'll turn our attention
14 full throttle right after this hearing to do the paperwork to
15 open DIP account. And I don't anticipate that will be too
16 controversial. I think Wells Fargo is a depository, recognized
17 depository, and it certainly would ease the transition and the
18 flow of funds from one Wells Fargo account, so to speak, to
19 another.

20 THE COURT: Well, I guess when Mr. Masumoto was
21 addressing that point earlier, it sounded to me like he might be
22 asking for the addition of some further language in the cash
23 collateral order. I don't know if that's something you're
24 working on, or alternatively, if Mr. Masumoto might be satisfied
25 with the representations you're making at today's hearing.

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1 MR. MASUMOTO: Your Honor, Brian Masumoto for the
2 Office of the United States Trustee. I provided Mr. Nash with
3 the typical language that's included in most cash management
4 orders, providing for a period of time, typically 45 days, in
5 order for the debtor to come into compliance, so that we can
6 review the DIP account, which is, as far as we know, currently
7 has not been established. But once established, we will have
8 the opportunity to verify that it meets the authorized
9 depository requirements and so forth. I believe Mr. Nash has
10 seen similar language, and I'm assuming that that won't be an
11 issue to include in the cash management portion of the order.

12 MR. NASH: Your Honor, just briefly, it's not. I'm
13 aware of the language, I euphemistically call it 345 language,
14 and we will certainly put it in, and I do think Wells Fargo will
15 be able to meet those requirements.

16 THE COURT: Okay. And just, just to talk about
17 logistics for one second, I want to hear you and anybody else
18 who wants to be heard on this motion. After that, I do have a
19 number of concerns of my own about specific provisions of the
20 proposed order. So, we're going to spend some time walking
21 through those. And the upshot is going to be that I'm going to
22 ask you to submit a revised order that addresses the various
23 points. And I'm hoping that you'll work out any revised
24 language with Mr. Petrick and Mr. Masumoto. So, when you're
25 doing that, then I trust you will also add a paragraph

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1 addressing the issue that Mr. Masumoto was just raising.

2 MR. NASH: Yes, we will do that, Your Honor.

3 THE COURT: Okay. All right. I think I interrupted
4 you. Was there more you wanted to address?

5 MR. NASH: No, Your Honor, I think it's a good segue
6 into fielding the court's comments. As Your Honor is aware,
7 cash collateral orders, I said tongue in cheek, try not to send
8 over too draconian a provision for me, and we try to work
9 through it to neutralize certain terms. I did do in my motion, I
10 think we went over the local rule disclosures on cash
11 collateral, and I did try to make sure that there are a
12 challenge period for outside creditors. And I try to balance
13 the hotel's need for cash, the lender's first priority position,
14 and as much as I could get out of the lender on this.

15 THE COURT: Okay. All right, let me hear next from
16 Mr. Petrick. Mr. Petrick, if there's anything you'd like to
17 add?

18 MR. PETRICK: Thank you, Your Honor. I don't have
19 anything substantive to add. We've been engaged in the process
20 with Mr. Nash now for some weeks of reaching a consensual order.
21 So, it reflects our agreement. Obviously, we will work with him
22 as well to reflect whatever changes come out from this
23 afternoon, including Your Honor's comments.

24 THE COURT: I guess while I have you, let me ask you
25 one preliminary question, because it relates to a few of the

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1 provisions that I'm going to be looking at with all of you. Is
2 it your position that you're over secured? I know it's the
3 debtor's position. Do you agree with that?

4 MR. PETRICK: As far as we can tell, Your Honor, we
5 are we have not had a full valuation. We have seen desktop
6 appraisals that suggest we are over secured, and we believe that
7 that is the case. The extent to which we may be over secured, I
8 am not certain of that. There is not sufficient cashflow to
9 service the debt as it exists, but our belief is that we are
10 over secured. My colleague Ingrid Bagby is on the phone. I
11 don't know, Ingrid, if you have anything to add to that.

12 MS. BAGBY: Good afternoon, Your Honor. Ingrid Bagby
13 from Cadwalader, for OWS CRE Funding I LLC. And I just want to
14 echo my partner Greg Petrick's comments with respect to your
15 question about whether the lender is over secured.

16 THE COURT: Okay. Good to see you. I guess I have
17 one question for whichever of the two of you wants to answer.
18 So, I'm sure I'm missing something, but Mr. Petrick just said
19 there's not sufficient cashflow to service the debt. Maybe I'm
20 misreading the budget because I thought the cash collateral
21 order proposes to pay debt service going forward, and it shows
22 something like \$300,000 a week of net cashflow remaining after
23 the debt has been serviced. So, what am missing?

24 MR. PETRICK: I will ask Ms. Bagby to jump in, but the
25 hotel is performing better now than it had been. Occupancy is

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1 up. However, since this loan has closed, the cashflow from the
2 building, there's only been sufficient cashflow or cashflow
3 above and beyond the operating needs for payment towards debt
4 service a few times. So, we have that budget. I think it sort
5 of reflects the summer season and some improvement in the
6 operation of the hotel, but I don't think we're prepared to say
7 today that that's a steady state condition of the property.

8 THE COURT: So, is it fair to say that I'm not
9 misreading the budget? The budget does show that for the next
10 13 weeks, there's more than enough cash to pay debt service, but
11 it's cyclical or seasonal.

12 MR. PETRICK: Yes. Yes.

13 THE COURT: And we're in the best season right now.

14 MR. PETRICK: I think that that's an accurate summary,
15 Your Honor. And how that transpires for the rest of the season
16 and into slower parts of the year remains to be seen.

17 THE COURT: Understood.

18 MR. NASH: Your Honor, can I just make one
19 clarification?

20 THE COURT: Sure.

21 MR. NASH: The bottom line, as they say, the category
22 is net cashflow for debt service. Maybe it's not as artful as
23 it needs to be, but that's what we have available for debt
24 service. It's not after we make debt net, it's not a net profit
25 type of thing, it's net cashflow for debt service. And we're

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1 projecting around \$900,000 on the next debt service payment
2 date, which would be the September 8th and 9th. So, I don't want
3 to mislead anybody, it's for debt service. It's not after we
4 make debt service. It's not net overall profits. I wish we did
5 have that, to be honest with you.

6 THE COURT: Okay. All right. So, thank you for
7 clarifying, because I guess I was misreading the budget then.
8 But just to put it in perspective for me, so call it 300,000 a
9 week of net cashflow for debt service, do the debt service
10 obligations exceed that amount?

11 MR. NASH: Yes. At the base contract rate, it's a 1.7
12 million. At the default rate, it's a much higher number.

13 THE COURT: So, it's 1.7 what?

14 MR. NASH: Million.

15 THE COURT: I know, but annually?

16 MR. NASH: No, monthly.

17 THE COURT: Oh, monthly. Okay. Ah! Okay. All
18 right. So, in other words, even now, at the best season,
19 there's significant cash flow.

20 MR. NASH: From the regular debt service from the
21 regular contract rate payment.

22 THE COURT: That's what I'm and if default rate were
23 used, it would be even greater.

24 MR. NASH: Even greater. But on that point, we did
25 make a full \$1.7 million payment to the lender last week. I

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1 think it was August 8th or 9th, and I reviewed the papers again,
2 and I think there were some protective advances made to the
3 lender as well. So, as we sit here today, I think the fall to
4 the lender is being managed, and they will be getting monies
5 under this budget.

6 THE COURT: Okay. All right. So, I appreciate this
7 clarification. And frankly, to turn back to the question of
8 whether this debtor is properly in bankruptcy, it's a whole lot
9 easier to see that a bankruptcy filing is proper once one
10 understands what you've just educated me about. Right? Because
11 basically, you're telling me this hotel is not able to meet its
12 obligations as they come due in the ordinary course.

13 MR. NASH: They certainly are not.

14 THE COURT: All right. Okay. Thank you. I know that
15 was not, strictly speaking, on the table for today, but I always
16 like to get a broader context, and so I appreciate your helping
17 educate me in that regard. Okay. Let's turn to the proposed
18 order. Let me grab my copy, and please do the same at your end.
19 And I want to walk through it page by page.

20 MR. NASH: Sure.

21 THE COURT: I want to walk through it page by page,
22 and some points are little knits and others are much more
23 substantive, but I still think the simplest way to do it is just
24 go page by page.

25 So, page 2, first paragraph, sixth line. After it

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1 says, approval of the requested relief, please add, comma as
2 modified herein, comma.

3 My next comment is not till page 7, paragraph G. So,
4 this is a much more substantive comment. I think this paragraph
5 should come out, and there are similar paragraphs on page 27
6 that should also come out. And let me just be very clear about
7 my thinking here, and I think this won't surprise you. Like
8 many other judges, certainly in this court, I don't think it's
9 appropriate at an interim order stage on a cash collateral
10 motion to approve waivers of 506(c) or 522(b) or waivers of
11 marshalling. I am not ruling those out at the final order
12 stage, but I think those should be deferred, and you can put
13 them in the order, and I will consider them at the final order
14 stage.

15 So, just to jump ahead to page 27, the conforming
16 change there, is to delete paragraphs 13, 14 and 15. Those are
17 the three corresponding paragraphs. And by the way, let me make
18 one logistical note. At certain points in the order, there are
19 references to other numbered paragraphs of the order. And just
20 please be careful, after you've made the very substantive
21 changes to do a careful search for those sort of cross
22 references and fix the paragraph numbers are going to change.

23 MR. NASH: We will do that, Your Honor.

24 THE COURT: Okay. My next comment is on page 9.

25 First, a couple of small comments. In paragraph 1, where it

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1 says, the motion is granted on an interim basis. Then it says,
2 as set forth herein. Please change that to, the extent set
3 forth herein, given that there's certain modifications that
4 we're talking about. And then, similarly, in paragraph 2, at
5 the end of the first sentence, after overruled on the merits,
6 please add except to the extent set forth herein.

7 Okay. Moving on. I have a problem with paragraph 3,
8 and this is a conceptual point. Let's talk through the
9 substance of it, and then I'll let you work out language. I
10 have a problem with the very end of paragraph 3 where it says
11 that, the debtor's authorization to use cash collateral will
12 automatically end 15 days after the petition date. That's very
13 soon. That's going to be before any final hearing. To me,
14 that, frankly, just looks like a mistake. Certainly, I don't
15 think it's appropriate.

16 MR. NASH: I will say it is a mistake. I think we
17 were, in our minds, looking that this is an interim, with the 15
18 days being the statutory notice in terms of that. Maybe it
19 should be 15 days after entry of this order.

20 THE COURT: So, I'm happy to talk about when the final
21 hearing will be. I guess we'll be getting to that later on.

22 MR. NASH: Right.

23 THE COURT: I mean, first off, under Bankruptcy Rule
24 6003, I think I'm required to make that no less than 21 days
25 after the petition date. And then I want to go back to my

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1 calendar and think about a proper date. In light of what Mr.
2 Masumoto told us, let's say a committee is appointed at the you
3 know, let's say it doesn't happen till Monday, the 28th of
4 August. I'm giving a little bit of a day or two of possible
5 slippage of time. If that were the case, I think -- I mean tell
6 me if this creates problems, but I would think it's proper to
7 give the committee -- they're going to have to hire counsel.
8 Counsel will have to get up to speed about this case generally
9 and then dig into this specific motion. So, I think we need to
10 give them a week before the final hearing. So, I think that
11 would we'd be looking at a final hearing on -- you know,
12 generally, I like to do hearings on Tuesdays and Thursdays of
13 each week, although I'll make exceptions to that when it's
14 needed. But if we look at Tuesdays and Thursdays, I think we'd
15 be looking at September 5th or 7th for a final hearing. Does
16 that create problems? And I'm asking this both to you and to
17 the lender's counsel.

18 MS. BAGBY: Your Honor, may I be heard? It's Ingrid
19 Bagby from Cadwalader, for OWS CRE Funding. I certainly,
20 appreciate Your Honor's comment with respect to the 15 days. I
21 think the one issue I'd like to raise with respect to going past
22 Your Honor's decision on or potentially, past Your Honor's
23 decision on the lift-stay motion is, I think, we, certainly, one
24 of the drivers behind having a relatively short period of cash
25 collateral use under this order, is having the ability to

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1 understand what happens at that lift-stay hearing because we
2 certainly want to be in a position to re-evaluate cash
3 collateral use depending on who may be ultimately the owner of
4 the equity in the hotel.

5 THE COURT: And I'm just trying to recall the date.
6 The lift-stay hearing, is it set for August 31st?

7 MR. NASH: Yes, it is, Your Honor.

8 THE COURT: Okay. So, Ms. Bagby, am I understanding
9 you correctly? You're saying imagine, hypothetically, that I
10 grant the lift-stay motion, and I do that either on the 31st or
11 on September 1st, you might want to terminate cash collateral
12 right away. Is that basically what you're saying?

13 MS. BAGBY: Well, what I would say is we may want to
14 re-evaluate the circumstances under which cash collateral would
15 be used by a debtor that may or may not have a continuing
16 interest in managing the property, depending on who's running
17 the debtor at that moment.

18 THE COURT: No, it's a fair point, but just to make it
19 concrete, you're basically saying, you might want, at that
20 point, to terminate it.

21 MS. BAGBY: Well, I don't think it's limited to
22 termination, Your Honor. I think there can be other remedies
23 put in place, depending on the court's decision. You know, I
24 don't want to presuppose, but if we have a scenario where the
25 stay is lifted, I think we, as the lender, want to make sure

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1 that there are sufficient protections in place while there's a
2 transition, if you will. And I imagine that may take some time,
3 but there's a transition in terms of who is running the hotel.
4 It seems to me that it would be a situation that calls for
5 perhaps more elaborate protections or different types of
6 protections, if you will, than are contemplated under this order
7 or under a typical cash collateral order.

8 THE COURT: I'm with you on I think this is a very
9 legitimate point. I'm just trying to think about how to
10 implement. So, right now we have a date for the lift-stay
11 hearing. I'm not anticipating it will change, although one
12 never knows. Sometimes things change unexpectedly. What would
13 you propose to implement the concern you just expressed?

14 MS. BAGBY: Well, Your Honor, as you noted, we were
15 proposing a relatively short period. I hear Your Honor's
16 concerns with respect to the 15 days. If Your Honor anticipates
17 having a decision, if not on the 31st, on the 1st, if we can have
18 the date be just after that, or the ability for the lender to
19 come in and ask for essentially what's like a bridge order or
20 something to address the concern about, as I said, the ability
21 to use cash when the whole fact set may have changed.

22 THE COURT: So, all of that makes sense to me. The
23 funny thing is, the date I was proposing, at least one of them,
24 is very shortly after the first.

25 MS. BAGBY: I'm looking at my calendar now, Your

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1 Honor, and I do appreciate that. August and September seemed
2 very far apart when you first said the dates.

3 THE COURT: Okay. So, let's just say, tentatively,
4 suppose I were to fit you all in for a final hearing on
5 September 5th. Now, I don't want to destroy your Labor Day
6 weekend, and so, if you all want to push that back, I would
7 listen. But let's just say, hypothetically, September 5th.
8 Then, I guess, I want you to think about, is that good enough,
9 or do you want to propose something a little more complicated to
10 deal with the issue you were just raising?

11 MS. BAGBY: Your Honor, if we go with September 5th,
12 perhaps we can add, like I said, a sentence providing a
13 provision. Very simply providing for the lender's ability to
14 seek relief sooner or modifications of the order sooner,
15 depending on whatever ruling Your Honor issues on the lift stay.

16 THE COURT: That makes sense to me, although we're
17 getting sort of crazy quick, given that basically you'd be
18 asking me to hold a hearing on the Saturday of Labor Day
19 weekend.

20 MS. BAGBY: Yes, I appreciate that, Your Honor, and I
21 think we're in a little bit of uncharted waters here, given the
22 fact set, but I'd like to have the ability, depending on what we
23 see going into the hearing as well, to at least bring to Your
24 Honor's attention that there might need to be alternate
25 mechanisms built into cash collateral use.

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1 THE COURT: I think that's appropriate. And if Mr.
2 Nash wants to be heard to object, that's fine. But if not, my
3 suggestion is going to be why don't the two of you work out
4 language along the lines of what you've suggested?

5 MR. NASH: I will attempt to do that, Your Honor. I
6 just know from a practical point of view, and I did discuss this
7 with the lender's counsel, even if the stay is lifted, there
8 still has to be a re-noticing of an auction sale. And I did
9 mention to lender's counsel that there is some statutory
10 authority in Delaware that a pledge and an assignment confers
11 economic entitlements as opposed to full management
12 entitlements. So, we'll build in all that. I understand the
13 lender's concerns. I'm sure we can come to a date. I don't see
14 anything happening instantaneously, and I think everybody's
15 interest is, no matter what happens, to maintain the operations
16 at the hotel.

17 MS. BAGBY: Your Honor, I don't want to belabor the
18 point, but I will just say, if we are in a world where the stay
19 has been lifted, I certainly appreciate Mr. Nash's point that
20 maybe the transition will not be immediate. But that isn't
21 essentially the situation where we may need additional
22 protection because things may be uncertain as to who has what
23 economic incentive and who's running the hotel. So, hopefully
24 we never get to that argument, we can agree on what happens, but
25 I just wanted to flag that.

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1 THE COURT: I think that's a fair point. Yeah. I
2 mean, frankly, if parties find themselves in a situation where
3 the debtors know they're being ousted, but they haven't yet been
4 ousted, that, frankly, could give rise to issues.

5 MR. NASH: And we'll address that, judge. That's not
6 where I'm heading. And so, we'll give everybody comfort and try
7 to come up with an appropriate date.

8 THE COURT: Okay. All right, so the ball is in your
9 collective court on how to deal (b) portion, the last line of
10 paragraph 3.

11 Okay. Moving on. My next comment is on page 14,
12 paragraph 5, near the top of the page. Specifically, the third
13 line, and then again, on the fifth line, it refers to three (3)
14 days. And I think in both cases, it should be changed to three
15 (3) business days. Just to give you sort of an example that
16 makes clear why that needs to be the case, imagine there's a
17 three-day holiday, a three-day weekend. Any problems with that
18 change?

19 MS. BAGBY: No, Your Honor.

20 THE COURT: Okay. Okay. Now we come to one of my
21 most substantive points. And this comes up on page 15, and also
22 page 20, and also page 25. And it relates to the power that the
23 lender is given under this order as currently drafted to
24 terminate cash collateral use if the debtor seeks entry of a DIP
25 order. And right now, that's drafted in unqualified fashion. I

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1 think that's too sweeping. For example -- one second. Yeah, I
2 don't think it's appropriate in any circumstance to restrict the
3 debtor's ability to enter into a non-priming DIP. I appreciate
4 that the lender would have greater concerns if there's a priming
5 DIP that's proposed. But I don't see that it's legit to bar a
6 non priming debt. In addition, in this case, it appears to be
7 the case. I know nobody knows for sure and you haven't yet done
8 a full appraisal, but certainly everybody appears to believe
9 that the lender is over secured. And if that's the case, then
10 even a priming DIP shouldn't be a problem or shouldn't be
11 something that the lender has the power to block. And so, I'm
12 inclined to ask that this provision on paragraph on page 15 and
13 then also, when it reappears on pages 20 and 25 be modified to
14 take those points into account. I'm happy to hear from both Mr.
15 Nash and either Ms. Bagby or Mr. Petrick on that point, if you
16 want to be heard.

17 MS. BAGBY: Your Honor, I understand your point with
18 respect to the non priming DIP. I think with respect to a
19 priming DIP, we are in a unique situation here in a sense.
20 First, as Your Honor noted, we don't actually know the extent of
21 the over collateralization in this situation. And second, we
22 are in a situation where the debtor has already proffered an
23 alleged term sheet. And so, the debtor has stated their
24 intention to obtain a DIP that takes out the lender. And we
25 don't want to be in a scenario where we're being told that we're

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1 being taken out, but we're not actually being taken out,
2 obviously. As Mr. Petrick foreshadowed, we are concerned about
3 why we're even here, although I understand the dialogue that the
4 court has had with Mr. Nash, but having a chapter 11 case where
5 we are now dealing with a priming DIP that's not even addressing
6 our debt seems like a big load to bear.

7 THE COURT: Okay. Mr. Nash, did you want to --

8 MR. NASH: Yes. Yes. If I could just give you my
9 thought process, because we did discuss this provision. My
10 thought process was both practical and -- in an effort to give
11 the debtor flexibility in this scenario. From a practical point
12 of view, from my discussions with the debtor, and I've spoken to
13 at least two lenders, I didn't see a priming DIP for anything
14 other than to take out the first lender and to give added
15 liquidity. I didn't see any real appetite for lenders to do
16 anything that was a priming type of situation, and I didn't see
17 any real benefit to the estate of doing that because we did have
18 positive cashflow, and we are looking for liquidity to deal with
19 other obligations at a hotel towards a plenary organization. I
20 did carve back for myself and for the estate that if the DIP
21 loan took care of the first lender, that was a permitted type of
22 borrowing. So, I balanced that. That's my goal is to refinance
23 the existing first. I didn't see a market for a smaller DIP
24 facility. Even if I got it, I don't know what I would do with
25 it because I have a senior loan that I owe \$164,000,000, and

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1 they probably would have first call on those monies, and they
2 wouldn't let me do much with it, and I didn't see any great
3 benefit on doing anything other than a senior loan that took out
4 the first or a DIP loan that took out the senior. So, that was
5 my mindset when we went over this provision. And from my point
6 of view, as long as I have the ability to take out the senior
7 lender in its entirety under a DIP loan and that doesn't cause
8 any problems, I was satisfied with that. I appreciate what Your
9 Honor is saying, to give me even more flexibility, but that was
10 my mindset. I didn't give away the store per se, I tried to
11 balance the interest from a practical point of view because I
12 didn't see me getting a DIP loan other than to take out the
13 first and have added liquidity.

14 THE COURT: Okay. All right. I think what I'm going
15 to do is I'm going to ask that this be modified to permit a non-
16 priming DIP, but only modified to that extent. And just to be
17 clear, in addition to page 15, it comes up again on page 20 in
18 paragraph 9(a), and then it comes up again on page 25 in
19 paragraph 11. Okay. When you're ready, let's move on. Oh, I
20 was waiting for you, Mr. Nash.

21 MR. NASH: I'm sorry. Yes, I'm ready. I made those
22 notes.

23 THE COURT: Yeah, no worries. Okay. Page 16 at the
24 very bottom of the page, last couple of lines. This relates to
25 adequate protection, replacement liens, and whether they cover

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1 avoidance actions, or the proceeds of avoidance actions. At the
2 interim order stage, these need to be carved out. That is,
3 right now, it needs to say the opposite of what it now says. It
4 now says, they can cover avoidance action proceeds. It needs to
5 say they cannot cover, at this stage, avoidance actions or the
6 proceeds thereof. I am not ruling that out for consideration at
7 a final hearing. And I don't think it'll surprise you, it's
8 pretty standard to not allow that at the interim order stage.

9 MS. BAGBY: Understood, Your Honor.

10 THE COURT: Okay. If you have that, the next comment
11 is at page 18. This is one of my more substantive and slightly
12 more complicated points. Ms. Bagby or Mr. Nash, either of you,
13 tell me if I have this wrong, but the way I'm reading the
14 provision in paragraph little four on page 18 is that, if
15 there's a failure to make adequate protection, monthly adequate
16 protection payments to cover non-default interest, the unpaid
17 amount gets picked and added to the amount of unpaid principal.
18 And I'm assuming that as a result of that, interest would be
19 charged from then on, on that increased principal amount.

20 MS. BAGBY: That's correct. That's my understanding,
21 Your Honor. And that's also consistent with the loan agreement.

22 THE COURT: Okay. The problem I have with it is that
23 for all we know, we don't know what your client's position is
24 going to be at the end of the case. It's conceivable at that
25 point, although maybe not at all likely, but conceivable that at

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1 that point you're under secured, it's conceivable there's been a
2 challenge to the validity of your claim or your liens, and maybe
3 that has succeeded. And if that were to happen, then I need to
4 have the authority -- I can't have my hands tied by this order.
5 I need to have the authority in that circumstance to
6 recharacterize or recalculate the amount of your allowed secured
7 claim. Did that make sense?

8 MS. BAGBY: Your Honor, it makes sense to me. Mr.
9 Nash, I don't know if you wanted to speak. I do understand Your
10 Honor's concern. I think we can address it by adding some
11 language reserving for the possibility that the court may need
12 to, as you said, revisit the recharacterization of the post
13 petition interest as an obligation.

14 THE COURT: That would be the idea. That I'm not
15 barring you from doing this, but I just want it to be clear that
16 nothing in this order, it's all without prejudice to the power
17 of the court in appropriate circumstances to recharacterize it
18 at the end of the case.

19 MS. BAGBY: Understood, Your Honor. We can make that
20 change.

21 THE COURT: Okay. Mr. Nash, any comments?

22 MR. NASH: No, that's fair. I appreciate that, Your
23 Honor. I would just say, it's probably recharacterized or
24 reallocated, but I think the point is well taken. I do think
25 they are over secured, but if there is a challenge period, then

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1 obviously, their entitlements change with that. So, I'm sure
2 the lender and I can work out some reservation of rights on
3 that.

4 THE COURT: Okay. Yeah, and I'm in no way wedded to
5 the word "recharacterized." That was my shorthand. Okay.
6 Actually, I see I jumped over a smaller point on page 16. So,
7 when you're ready, let's go back to page 16.

8 MR. NASH: I'm there.

9 THE COURT: Okay. This point comes up in two places.
10 Sorry, hang on. So, actually, you know what, this is not a new
11 substantive point, but this is just one further detail
12 concerning implementing the point I made a few minutes ago about
13 avoidance claims and the proceeds of avoidance claims.

14 MR. NASH: Right. So, that needs to be built into the
15 end of paragraph little two. It also needs to be added at the
16 end of paragraph little one. One way of doing it -- you know,
17 I'll leave it to you to implement the drafting. But one way of
18 doing it would be in the last line and a half of paragraph
19 little one, that starts, provided, however, you could say,
20 provided, however, that the replacement liens, (x) shall only be
21 blah blah blah. And then at the end of the sentence, and (y)
22 shall not apply to avoidance actions or the proceeds thereof.
23 However you want to do it, I just want to make sure you address
24 the point in that paragraph as well.

25 MR. NASH: I think that's very good language. I think

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1 that covers it.

2 THE COURT: Okay. I have one other language knit.
3 Now, we're back to page 18. This is a typo, but the sort of
4 typo that can create problems. You see at the top of the page on
5 the second line you have a little A? Shall be entitled to 'A'
6 blah blah blah.

7 MR. NASH: Right.

8 THE COURT: And then six lines or seven lines up from
9 the bottom, you have a little two, right before the additional
10 benefits set forth.

11 MR. NASH: Right.

12 THE COURT: And I'm sure that should be a 'B', not a
13 two, because I'm pretty sure that's meant to correspond to the
14 little A.

15 MS. BAGBY: We will look at it carefully, Your Honor,
16 but I believe you are correct, and we appreciate the
17 clarification.

18 THE COURT: Okay. Yeah, I mean, that's the sort of
19 error that can screw people up when they're trying to read and
20 understand the order. Okay. My next comment is more
21 substantive, and this relates to the very bottom of page 18,
22 carrying over to the top of 19, the definition of available
23 cash. Here's the problem I have. I think you need to add a
24 cushion. Because the way it works, as currently drafted, is
25 every -- is it month or week? There's a periodic sweep.

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1 Basically every available dollar gets swept out and that happens
2 both in good months as well as bad. But every debtor has ups
3 and downs, every business has ups and downs, and there may be
4 weeks or months where there are shortfalls. And the way this is
5 drafted, it doesn't allow a cushion for the debtor to cover
6 shortfalls of that sort. So, I think you need to build in a
7 cushion and I think the two of you need to negotiate what the
8 amount of that cushion should be.

9 MS. BAGBY: Your Honor, maybe -- oh, I'm sorry, Mr.
10 Nash.

11 MR. NASH: I understand the point, and I'm sure we'll
12 work that out. We did spend a good bit of time on how we define
13 excess cashflow, available cash, the mechanic of how it's going
14 to work. There's a variance on expenses as we go in there, and
15 it's budgeted expenses. So, if the revenues aren't what we
16 budgeted, but the expenses are consistent, it's just less
17 available cash. But we will build in a cushion. Maybe if we
18 see a need in the following months for a little bit more cash,
19 then we'll build something in.

20 MS. BAGBY: If I can propose something, Your Honor?
21 Again, Ingrid Bagby from Cadwalader. Perhaps since we can't
22 foresee what any particular month will be. And it's certainly
23 the lender's desire that the hotel always have sufficient funds
24 to cover operations. Perhaps we can build in a good faith
25 conference. If, as Mr. Nash said, the debtor foresees that

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1 there's an upcoming month where they're forecasting insufficient
2 cash, we agree to confer in good faith with them.

3 THE COURT: Here's a suggestion. What if you did a
4 hybrid that had a cushion and also had a conference mechanism?
5 Because of the conference mechanism, the cushion wouldn't have
6 to be as big as if there wasn't a conference mechanism.

7 MS. BAGBY: Understood, Your Honor. That's something
8 we can certainly talk to Mr. Nash about.

9 THE COURT: All right. Moving on. Give me one second
10 to check my notes. Yeah. Okay. Page 19, paragraph 7, little
11 one, the carve out for professional fees. Two points. The
12 first is, right now, it says the carve out will be acceptable to
13 the lender in its sole discretion. It really needs to be
14 acceptable to me as well. So, I think you could say the lender
15 in its discretion and to the court. And then second, in order
16 for me to evaluate the adequacy of the carve out, I think I need
17 you to file a final budget in a reasonable amount of time before
18 the final hearing. And when I say final, what I'm thinking of
19 is the budget that's been filed is quite non-final in the sense
20 that it doesn't include professional fees. So, I assume you're
21 building in professional fees, and future budgets will include
22 those. And I think you should add a provision that ensures that
23 a complete budget -- and maybe complete is a better word than
24 final. A budget that includes fees gets filed in a reasonable
25 amount of time before the final hearing.

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1 MR. NASH: Yes. We will do that, judge. We've had
2 discussions on it, and we will certainly do that.

3 THE COURT: All right. Give me one second.

4 MR. MASUMOTO: Excuse me, Your Honor. Brian Masumoto
5 for the Office of the United States Trustee. I did discuss with
6 Mr. Nash with respect to the carve out that the carve out
7 doesn't provide what we frequently refer to as burial expenses
8 should the case convert to a chapter 7. And I believe Mr. Nash
9 said, he was bringing that up with the lender. I know that
10 there's discussion as to whether or not the lender is over
11 secured, which in some cases lenders argue, therefore, no burial
12 expense is necessary. But I take the position that if they are
13 over secured, any amounts included in a burial expense should
14 not be an issue.

15 THE COURT: Let me hear from Mr. Nash and Ms. Bagby on
16 that.

17 MR. NASH: Your Honor, I think it's fairly
18 conventional to have a burial expense provision in there, and I
19 would be very surprised if the lender has great objection to
20 that.

21 MS. BAGBY: Your Honor, we understand that as part of
22 any final order that's going to be part of the process.

23 THE COURT: But I think what Mr. Masumoto is proposing
24 is that, in this order, you provide that it will be in the final
25 order.

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1 MS. BAGBY: Understood, Your Honor.

2 THE COURT: So, in other words, you don't have to
3 quantify it in this order, but you do have to reference it.

4 MS. BAGBY: Yes. Understood.

5 THE COURT: Okay. Moving on. Just one second. Okay.
6 Paragraph 9 on page 20. We've already talked about the DIP
7 point, but I want to address a different point. This new point
8 is in 9(b) at the bottom of the page, which currently says, (b),
9 pay any amount for any use not provided for in the approved
10 budget. I think you should add at the end of that phrase,
11 except to the extent approved by the court. And I don't think
12 that's a substantive change, because I think in other places of
13 the order, you recognize that variances from the budget can be
14 approved by the court.

15 MS. BAGBY: Of course, Your Honor. Understood.

16 THE COURT: Right. Okay. Very top of page 21. Here,
17 I think, the parties just dropped the ball. I assume this was
18 inadvertent. Little 'D', at the very top of 21, refers to the
19 fact that, this is part of a litany of things that cannot for
20 which funds cannot be used, cash collateral cannot be used
21 without the lender's consent, and there's a bar to any
22 investigation of claims, except as set forth in paragraph 10.
23 And paragraph 10 doesn't have a dollar amount that's carved out
24 for investigation, and it should. Right? Ordinarily, you'd see
25 a provision saying the committee can spend up to, say, \$50,000.

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1 I think that would be an appropriate amount in a case like this
2 to investigate potential claims against the lender. Any big
3 squawks about that number?

4 MS. BAGBY: We don't object to that number, Your
5 Honor.

6 THE COURT: Okay. And you understand the point,
7 right? I mean, I think this was just inadvertent. Okay.
8 Moving on. Give me one second. I think that point may also
9 come up again in another spot, and I'm trying to find it. No,
10 maybe not. If you see that it does come up somewhere else,
11 please fix it there, too. But I'm not sure it does. Okay.

12 Another substantive point on page 25, paragraph 12.
13 So, this actually is a very long paragraph. I think paragraph
14 12 needs to come out. Like several other points we've talked
15 about, you can put it in the final order, and I'll consider
16 whether it's appropriate at that stage, but it's not appropriate
17 at the interim order stage.

18 And sorry to jump around, but let's go back. When
19 you're ready, let's go back to page 21. Sorry, hang on, I got
20 the page wrong. Give me one second. Okay. Sorry, we're not
21 going back. We're going forward, you'll be glad to know, to
22 page 32. Paragraph 21, sub one, needs to come out. And
23 frankly, this strikes me as just an error. This paragraph, if
24 I'm understanding it, is predicated on a misreading of section
25 363(m) of the Code. That paragraph of the Code only applies to

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1 sales and leases. It does not apply to use of collateral. And
2 so, a provision of this sort in a cash collateral order is not
3 appropriate, even in the final order. So, I think this
4 paragraph needs to come out. I'm going to pause for a moment in
5 case either of you want to respond. Okay? Am I right?
6 Everybody's okay with that?

7 MS. BAGBY: Understood, Your Honor.

8 THE COURT: Okay. Page 33, paragraph little four.
9 This is a smaller, smaller point. Third line of paragraph
10 little four. At the bottom of 33. Please strike the words and
11 the final order. It's just not appropriate at this stage to say
12 what the final order will do or will not do. We'll deal with it
13 at that time.

14 Okay. The very bottom of page 34. The very last line
15 of page 34. This is just an example where it references
16 paragraph 12, where the number will need to change.

17 Okay. Next, top of page 36. Very end of paragraph
18 26. Give me one second. Okay. So, this is the final hearing,
19 and I guess let me ask, the time is upon us to pick a date for
20 the final hearing. If this works for both of you, I'm prepared
21 to give you September 5th, but I don't want to force that on you.
22 So, would either of you prefer a different date?

23 MS. BAGBY: For the lender, September 5th works.

24 MR. NASH: I have no objection, judge. I think it's a
25 good day.

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1 THE COURT: Okay. Let me just check my calendar for
2 that day. So, I would say two o'clock, except I have something
3 that ends at 2:00, and I want to take a short break in between.

4 MS. BAGBY: So.

5 THE COURT: Let's say 2:30, September 5th at 2:30 for
6 the final hearing. And then I want to build in a safety valve,
7 that is, in the event a committee is appointed and they want to
8 argue that they need more time, I'm not telling you I'll grant
9 it, but I want to give them the right to make that argument.
10 And I guess not just for a committee, but if any other party and
11 interest wants to make that argument. So, I think the way to do
12 it is, if you add at the very end of paragraph 26, language
13 along the following lines, without prejudice to the right of a
14 committee, if appointed, or any other party in interest, to
15 request an adjournment of the final hearing. And that is all I
16 have.

17 So, I know that's a fair amount, probably a bit more
18 than you expected, but tell me what let's just spend a minute on
19 what's next. I assume you need prompt relief on this motion, so
20 when you submit a revised order, particularly if you tell me
21 it's been blessed by the debtor, the lender and the U.S.
22 Trustee, I'm prepared to act quickly. I'll want to review it
23 carefully, but I and my clerks will make it a top priority to
24 review it quickly and hopefully enter it the same day. So, do
25 you want to set a schedule or just do your best to turn this

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1 around?

2 MS. BAGBY: I anticipate that this order could be
3 revised per Your Honor's instructions fairly quickly, unless Mr.
4 Nash has a different view.

5 MR. NASH: No, I think we can. I mean, we'll work
6 together. We've been working together for the last several
7 weeks, and I'm sure we'll get it together. I took notes. I'm
8 sure that all the lenders counsels took notes and hopefully I'll
9 make sense of those notes. But I think we can get it together
10 sometime tomorrow.

11 THE COURT: Okay. I guess let me just point out I
12 have a personal conflict on Thursday. I'm going to be
13 traveling, and so I won't have no availability on Thursday, but
14 I don't know, it may be quicker if you can get it to me by
15 tomorrow afternoon. In that case, I'll try to prepare to work
16 into the evening to turn it around and finalize it by tomorrow
17 evening. If you can get it to me by, say, mid afternoon, if you
18 can't, then so be it. But I just wanted to flag that for you.

19 MS. BAGBY: Your Honor, again, it's Ingrid Bagby from
20 Cadwalader. I certainly think we can get it to you by that
21 time. If I can raise one procedural issue, actually, or timing
22 issue with respect to the wages motion, I want to make sure that
23 the debtors counsel is aware. I think we're sort of ready to go
24 on that. But we want to make sure that order gets entered as
25 soon as possible.

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1 THE COURT: And remind me, I'm afraid it's escaped
2 from my head where we left that, exactly.

3 MR. NASH: Your Honor, Kevin Nash. Your Honor granted
4 it. I'm going to make a change or two consistent with the
5 record. We do fund monies into ADP on Tuesday. So, it stays
6 there. Checks won't be issued until Friday. So, I would ask
7 Your Honor at least allow us, pending submission of this order,
8 which you'll have tomorrow, to fund the money into ADP.

9 THE COURT: Does anybody object to that? And Mr.
10 Masumoto, I'm particularly looking at you.

11 MR. MASUMOTO: No objections, Your Honor.

12 THE COURT: Okay. So, that's acceptable, Mr. Nash.

13 MR. NASH: Thank you, Your Honor.

14 THE COURT: Ms. Bagby, does that solve your problem?

15 MS. BAGBY: Absolutely. Thank you very much, Your
16 Honor.

17 THE COURT: All right. Anything else? Okay. So, I
18 think we're adjourned for now, and I will look forward to
19 getting the various orders from you.

20 MR. NASH: Thank you, Your Honor.

21 MR. PETRICK: Thank you very much, Your Honor.

22 THE COURT: Thanks everybody.

23 MR. NASH: Thanks.

24 THE COURT: Bye.

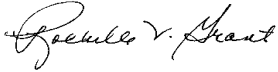
25 MR. MASUMOTO: Thank you, Your Honor.

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CERTIFICATION

I, Rochelle V. Grant, approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in this matter, 23-11289-pb, held on 8/15/23.



August 16, 2023